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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

KARL B. NICHOLAS,

Petitioner and Appellant,

v.

MARIN COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Respondent and Respondent.

A134905

(Marin County
Super. Ct. No. CIV 10-03556)

Karl B. Nicholas, in propria persona, appeals from an order denying his motion to vacate a judgment, contending that the trial court abused its discretion. We affirm.

FACTUAL BACKGROUND

On July 9, 2010, Nicholas filed a petition for writ of mandamus seeking to review an administrative hearing involving the Marin County Department of Social Services (the Department).¹ The Department filed an answer to the petition on November 30, 2010. On December 15, 2010, the court notified the parties that a case management conference was set for January 11, 2011. When neither party appeared at 8:30 a.m., the court ordered the parties to pay sanctions in the sum of \$149. The Department, however, appeared at 9:42 a.m. and the case was recalled. The court discharged the sanctions as to the Department and ordered Nicholas to pay \$149 in sanctions by January 25, 2011, and

¹ The petition is not in the record on appeal. The record reveals that the underlying issue addressed by the administrative hearing was Nicholas's challenge to a finding that he committed child abuse.

to file his case management conference statement. The court continued the matter to January 25, 2011 for the case management conference.

Nicholas failed to appear for the hearing on January 25, 2011. The Department requested terminating sanctions against Nicholas for his failure to appear. The court granted the request, denied the petition for writ, with prejudice, and entered judgment in favor of the Department. The court mailed notice of entry of judgment to the parties on February 3, 2011.

Nine months later, on November 4, 2011, Nicholas moved to set aside and vacate the judgment on the ground of extrinsic mistake. He alleged that he was unable to respond to the proceedings because he had been incarcerated in the San Francisco County Jail between November 3, 2010 and August 24, 2011.

The Department opposed the motion, arguing that Nicholas's failure to notify the court and the Department of his change of address, and his failures to appear or arrange for telephonic appearances for the case management conferences or to request continuances, justified the terminating sanctions. The Department also noted that Nicholas had missed case management conferences in other related cases. In particular, counsel for the Department averred in his declaration in opposition to Nicholas's motion to vacate, that Nicholas " 'has missed the last few CMC's in his three writs and has not opposed the demurrers on file, nor amended his writ in CV 1004228 [a related case]. It appears he may not be pursuing these three related writs, although no dismissal has been filed.' " Nicholas did not respond to these averments in his reply.

The court denied Nicholas's motion, finding that he had not exercised diligence in the case. The court ruled, "It was the Petitioner's responsibility to inform the court and opposing counsel of his new address at the San Francisco County Jail. Had he done so, he could have appeared telephonically as other incarcerated litigants regularly appear. Moreover, the Petitioner was released from incarceration on August 24, 2011, yet he did not file this motion until November 4, 2011 which is more than two months after his release. He has not met the showing necessary to invoke this court's equity power." This appeal followed.

DISCUSSION

Code of Civil Procedure section 473 provides for relief from default if a motion is brought within six months after a default is entered. (Code Civ. Proc., § 473, subd. (b).) A court, however, may grant relief from default beyond the six month period based on its equitable jurisdiction in cases involving extrinsic fraud or mistake. (*Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 470-471; *Stiles v. Wallis* (1983) 147 Cal.App.3d 1143, 1147.) “[T]his equitable jurisdiction to interfere with final judgments is based upon the absence of a fair, adversary trial in the original action. [Citation.] The right to relief has been extended to cases involving extrinsic mistake, . . . where the complaining party was disabled at the time the judgment was entered. [Citations.] Imprisonment is expressly recognized as a disability which tolls the general statute of limitations in civil actions. (Code Civ. Proc., §§ 328, 352.) . . . [¶] The granting of equitable relief requires not only a showing of appellant’s satisfactory excuse for not having made his claim or defense in the original action, but also a showing of his diligence in seeking relief after discovery of the facts.” (*Humes v. MarGil Ventures, Inc.* (1985) 174 Cal.App.3d 486, 499.) In addition, a court will not exercise its equitable powers, “unless it appears that the one whose interests were infringed can present a meritorious case; this does not require an absolute guarantee of victory; it is enough if the party pleads facts from which it can be ascertained that he has a sufficiently meritorious claim or defense to entitle him to a trial of the issue at a proper adversary proceeding.” (*Id.* at p. 500.)

Relying on *Humes, supra*, 174 Cal.App.3d at pp. 486, Nicholas contends that his incarceration is a satisfactory excuse for his delay in moving to set aside and vacate the judgment on the ground of extrinsic mistake. *Humes*, however, is distinguishable. There, the defendant was incarcerated during the time administrative proceedings were held before the labor commissioner, and also when the court held a hearing to confirm the labor commissioner’s determination. (*Id.* at pp. 496-497.) Prior to the administrative hearing, the defendant wrote a letter to the hearing officer asking that the hearing be continued because he was incarcerated, and stating that he wanted to appear and present a defense. (*Id.* at p. 496.) The hearing officer did not respond to the request, held the

hearing in his absence, and ruled against the defendant. (*Id.* at p. 496.) After receiving the decision, defendant wrote to the labor commissioner to complain of the unfairness of the proceedings. Nine months later, when he received notice of the plaintiffs' motion to confirm the labor commissioner's award, the defendant, who was still incarcerated, sent a seven-page sworn statement to the court, requesting that the statement be deemed his response because the prison law library did not have the appropriate reference materials to enable him to file a more formal response, and because he did not have an attorney, and he had limited access to phone calls, files and records. (*Id.* at p. 497.) The statement described how the administrative hearing had been held in his absence despite his request for a continuance. Attached to the statement was defendant's correspondence to the hearing officer and to the labor commissioner. The *Humes* court held that the defendant was prevented by the extrinsic factor of his incarceration from timely filing his response to seek vacation of the award, and remanded the matter to the trial court for a full adversarial hearing on whether the commissioner's determination should be confirmed or vacated. (*Id.* a p. 499-500.)

In the present case, unlike *Humes*, Nicholas has not established that his incarceration was a satisfactory excuse for not having appeared at the case management conference. The fact that Nicholas was incarcerated from November 3, 2010 to August 24, 2011 does tend to show a "disability." But entitlement to equitable relief requires, in addition, a showing of diligence and a proffer of facts that would support an arguably meritorious case.

Here, Nicholas does not claim to have made any effort whatsoever, during his entire ten months of confinement, to contact the court, or to request a continuance. Nor is there any evidence that he enlisted friends or family to assist in communicating with the court or opposing counsel concerning his case. While Nicholas did submit a declaration from an individual who worked in Prison Law Services, stating Nicholas had limited access to the law libraries while in jail, he does not claim that this limited access prevented him from communicating with the court or with opposing counsel regarding his case.

We do conclude that Nicholas was sufficiently diligent in pursuing his remedies after his release from jail, although he did not file his motion to vacate the judgment until November 4, 2011, a little over two months after his release. Nicholas submitted a declaration in support of his motion in which he averred that “[i]mmediately upon being released from my incarceration I contacted the court, determined the status of this case, filed a fee waiver, obtained the records of this case, contacted county counsel, [to request a stipulation for the judgment to be vacated,] and drafted and filed this motion in as timely [a] manner as possible.” This does not, however, excuse his prior lack of diligence leading to the dismissal of his action. In any event, the record fails to support his claim that his case is meritorious.

Nicholas acknowledges that in order to obtain the court’s equitable relief of vacating the judgment, he must show that he can present a meritorious case. (See *Olivera v. Grace* (1942) 19 Cal.2d 570, 579; *Humes v. MarGil Ventures, Inc.*, *supra*, 174 Cal.App.3d at p. 500.) Although he informs the court that he is challenging alleged irregularities in the administrative hearing held to address findings of the California Child Abuse Central Index, he has failed to include in the record on appeal his petition for writ of mandamus, the Department’s answer, or the decision of the administrative hearing officer; hence, we cannot determine whether he has alleged facts “from which it can be ascertained that the plaintiff has a sufficiently meritorious claim to entitle him to a trial of the issue at a proper adversary proceeding.” (*Olivera v. Grace*, *supra*, at p. 579.)²

Further, Nicholas’s allegation that he was prejudiced at the underlying administrative hearing because the Department failed to call Deputy Robert Crowley, an investigating officer, is without any support in the record. Nicholas did not make an offer of proof at the hearing, or to this court, as to what Crowley’s testimony would be or how

² It is well settled that a party challenging a judgment has the burden of showing reversible error by an adequate record. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 628, p. 704.) Nicholas’s status as a proper litigant does not excuse him from the duty to comply with the rules. An appellant in propria persona is held to the same standard of conduct as that of an attorney on appeal. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.)

it could affect the outcome of the hearing, instead providing only speculation. Nicholas's other allegation, that the hearing officer was biased because she was compensated by Marin County, lacks merit. Nicholas cites no authority for the proposition that a conflict of interest or inherent bias is created merely because a hearing officer in an administrative hearing involving the Department is paid by the County. If that were the case, charges of bias could be leveled against any county employee exercising quasi-adjudicatory powers.

In light of our conclusion that Nicholas did not exercise diligence during his incarceration and did not establish a meritorious claim entitling him to equitable relief, we need not address the other issues raised by the parties. We note, however, for the guidance of the trial court that the court's issuance of terminating sanctions resulted in a voidable judgment.³ So far as we can determine, the court granted the Department's oral request for sanctions at a case management conference without providing any notice to Nicholas that it might do so. The judgment entered upon the court's issuance of terminating sanctions, without any notice, was therefore voidable.⁴ (See *Lee v. An* (2008) 168 Cal.App.4th 558, 565-566 [court acted in excess of its jurisdiction by imposing terminating sanctions without adequate notice resulting in a voidable judgment which the court retained discretion to vacate on equitable grounds].)

DISPOSITION

The order is affirmed.

³ Terminating sanctions are an extreme remedy and should only be issued when a party's actions are willful and deliberate. (*Del Junco v. Hufnagel* (2007) 150 Cal.App.4th 789, 799-800.) "Trial courts should only exercise [the] authority [to issue terminating sanctions] in extreme situations, such as when the conduct was clear and deliberate, where no lesser alternatives would remedy the situation [citation], the fault lies with the client and not the attorney [citation], and when the court issues a directive that the party fails to obey." (*Id.* at p. 799.)

⁴ The court's notice to the parties setting the date for the case management conference did not provide any warning of the potential for sanctions for failure to appear at the case management conference.

RIVERA, J.

We concur:

RUVOLO, P.J.

REARDON, J.